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No. 82-695
IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEES.

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Questions Presented.

1. Does the United States District Court possess subject matter jurisdiction, under the provisions of 28 U.S.C. Sections 1331, 1337 and 1441(a), of a lawsuit filed by a state agency against a trust fund regulated pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.* ("ERISA") where the complaint specifically seeks a declaratory judgment that the pre-emptive provisions of ERISA do not immunize the trust fund from the imposition of liens created by state law, and where the agency specifically challenges an advisory opinion of the U.S. Department of Labor finding that the trust fund is immune, by virtue of the provisions of ERISA, from such levies?

2. Do the provisions of 29 U.S.C. Section 1132(a)(3) and 29 U.S.C. Section 1132(e)(1), which provide exclusive federal jurisdiction over civil actions by fiduciaries to obtain equitable relief from acts violative of the provisions of ERISA or from acts which violate the terms of the trust instrument, provide an independent basis for jurisdiction?

3. Do the provisions of Section 514 of ERISA, 29 U.S.C. Section 1144, explicitly or impliedly preempt the right of the State of California to levy on the assets of an employee benefit trust fund subject to regulation under ERISA, where the State's levy would interfere with the purposes for which the trust fund was created and would impose administrative expenses and burdens upon the trust fund unauthorized by federal law?

4. If the answer to the preceding question is in the affirmative, does such preemption contravene rights of the State of California preserved by the Tenth Amendment to the U.S. Constitution?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon.
8. Richard Greenberg.
9. Roger Jaska.
10. William Middleton.
11. Tony Hoffman.
12. William R. McClain.
13. Armando Lopez.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.
17. Boyd McDougal.
18. Carlos Cerna.

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vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

BRIEF OF APPELLEES.

I.
STATEMENT OF THE CASE.

This is an action instituted by the Franchise Tax Board of the State of California ("the Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its individual Trustees ("Trustees"). The action was originally filed in the Superior Court of the State of California for the County of Los Angeles. Within thirty days after service of the action, the CLVT and the Trustees filed a Petition for Removal of the action to the United States District Court for the Central District of California. The Board filed a Motion for Remand, which was denied by the U.S. District Court.

The CLVT filed a Motion to Dismiss the Complaint, together with a supporting memorandum. The Board timely filed a written opposition to the Motion to Dismiss. The

U.S. District Court elected, with the consent of the parties, to treat the Motion to Dismiss as if cross-motions for summary judgment had been filed. Treating the Motion to Dismiss in this fashion, the District Court granted summary judgment in favor of the Board and denied summary judgment to the CLVT.

The CLVT filed a timely Notice of Appeal, and the case was briefed and argued before a panel of the U.S. Court of Appeals for the Ninth Circuit. On June 22, 1982, the Court of Appeals issued a decision, one judge dissenting, reversing the decision of the U.S. District Court and remanding the case for further proceedings.

The Board filed a Notice of Appeal to the Supreme Court of the United States on September 17, 1982. On October 18, 1982, the appeal was docketed, and the Board's Jurisdictional Statement was filed. On November 17, 1982, the CLVT filed a motion to dismiss the appeal for want of a substantial federal question or, in the alternative, to summarily affirm the decision below.

On December 13, 1982, this Court entered an Order postponing the determination of jurisdiction to the hearing on the merits.

II.
OPINIONS BELOW.

The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on June 22, 1982; it is reported at 679 F.2d 1307 (Appendix A to Jurisdictional Statement). The Order of the U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was filed on July 21, 1982 and is not officially reported (Appendix D to the Jurisdictional Statement). The Judgment of the U.S. District

Court for the Central District of California was entered on December 4, 1980; it is not officially reported (Appendix B to the Jurisdictional Statement).

III.
STATUTES INVOLVED.

In addition to the statutes set forth in the Brief of the Franchise Tax Board, the following statute is material to this proceeding:

Section 514(b)(5) of ERISA, 29 U.S.C. Section 1144(b)(5), added by Public Law 97-473, signed into law on January 14, 1983, provides:

> "(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).
>
> "(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —
>
> (i) *Any state tax law relating to employee benefit plans* or
>
> (ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974 to the extent that it provides for more than the effective administration of such Act as in effect on such date." [Emphasis supplied.]

IV.
STATEMENT OF FACTS.

The facts in the within action are undisputed. The following facts appear in the Complaint and attached exhibits:

1. This is an action instituted by the Franchise Tax Board of the State of California (the "Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its Trustees ("Trustees"). The action seeks to obtain a declaratory judgment that it is empowered

to issue Notices to Withhold, under the provisions of California Revenue & Taxation Code Section 18817, to employee benefit trust funds governed by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

2. The CLVT is an employee benefit trust, established through collective bargaining between the Southern California District Council of Laborers (the "Union") and various employers' associations. (*See* Complaint at Jt. App., pp. 11-56.)[1]

3. The CLVT is administered by a Board of Trustees. Eight Trustees are designated by the Union; an equal number are designated by the employers' associations. (Complt., Par. 5, Exh. "A," Art. V.)

4. Employers bound to collective bargaining agreements with the Union are obligated to make contributions to the CLVT for each hour of work performed by laborers whose work is covered by such agreements. (Complt., Exh. "A," Art. VI.)

5. The Trustees of the CLVT administer the CLVT pursuant to the terms of a Trust Agreement promulgated by the settlors of the Trust. (Complt., Exh. "A," Art. V.)

6. The contributions made by employers to the CLVT are accumulated by the CLVT, which maintains a "vacation account" for each covered laborer. Annually, at a time specified by the Trustees, a check for the accumulated vacation benefits is paid to each covered employee, when the employee has satisfied the requirements set forth in the Trust Agreement. (Complt., Exh. "A," Art. IX.)

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[1]References to the Joint Appendix are abbreviated, for convenience, as "Jt. App."

7. The CLVT is a type of forced savings plan, or "spendthrift" trust, designed to insure that the beneficiaries (individual laborers) do not dissipate the benefits they are eligible to receive through the Trust until they are actually eligible for each year's lump sum payment. The Trust Agreement contains stringent provisions designed to insure that covered workmen do not use their Trust accounts to obtain credit or otherwise dispose of the sums payable to them before they are actually received.[2]

8. From time to time, the CLVT receives Notices to Withhold, issued by the Board, seeking to require the CLVT

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[2]Article 9.08 of the Trust Agreement provides:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, *no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other person and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective*. The money credited to a vacation account shall be subject to withdrawal and distribution *only* at the times and *in the manner* and *for the purposes* specified in this Agreement." [Emphasis supplied.]

Similarly, Section 4.06 of the Trust Agreement provides:

> "Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to voluntary transfer *or transfer by operation of law* or otherwise, *and shall be exempt from the claims of creditors or other payments and from all orders, decrees, garnishments, executions or other legal or equitable process of proceedings to the fullest extent permissible by law*." [Emphasis supplied.]

to set aside funds which the Board claims individual laborers owe the State of California in back taxes and/or penalties.[3]

9. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, *et seq.*, regulates the operation of "employee benefit plans." It is undisputed that vacation trusts like the CLVT are "employee welfare benefit plans" within the meaning of ERISA.[4]

10. In order to determine whether the Trust is obligated to respond to the orders of state judicial and administrative agencies seeking to levy upon benefits due beneficiaries of the Trust, co-counsel for the Trust wrote to the U.S. Department of Labor, which is charged with administering portions of ERISA, to request an advisory opinion. On

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[3]The authority of the Board to issue such Notices to Withhold is contained in California Revenue & Taxation Code Section 18817, which provides:

> "The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the State, political subdivision or agency of the State . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

[4]29 U.S.C. Section 1002(1) provides, in pertinent part:

> "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs . . ."

29 U.S.C. Section 1002(3) further provides:

> "The term 'employee benefit plan' or 'plan' means an employee benefit plan or an employee pension plan or a plan which is both an employee benefit plan and an employee pension plan."

December 28, 1979, the U.S. Department of Labor issued an advisory opinion stating, in pertinent part:

> "It is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA §514."[5] (Jt. App., pp. 68-72.)

11. The Advisory Opinion of the Department of Labor concludes that the garnishment by state agencies of the assets of ERISA-regulated trust funds would be inconsistent with the provisions of Sections 403(c) and 404(a) of ERISA, which generally forbid the disbursement of trust fund assets except to provide benefits and defray trust fund expenses.[6] *Id.*

12. Based on the advisory opinion letter issued by the U.S. Department of Labor, the CLVT has not processed the Notices to Withhold issued by the Board. (Complt., Exh. "H.")

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[5]Section 514 of ERISA, 28 U.S.C. Section 1144, provides, in pertinent part, as follows:

> "(a) Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section IV(a) and not exempt under Section IV(b). This section shall take effect January 1, 1975
>
> . . .
>
> (c) For purposes of this section:
>
> (i) The term 'state law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any state. A law of the United States applicable only to the District of Columbia shall be treated as a state law rather than a law of the United States.
>
> (ii) The term 'state' includes a state, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title." [Emphasis supplied.]

[6]Section 403(c) of ERISA provides, in pertinent part, that

> "The assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their bene-

(footnote continued on following page)

V.
ARGUMENT.

A. The District Court Properly Assumed Jurisdiction of This Action.

1. The Remedial Provisions of ERISA Support the Assertion of Jurisdiction by the District Court in This Case.

At the outset, it is important to note that the jurisdictional issue raised by the Board in this case arises solely as a matter of happenstance. The Board's original complaint seeks a declaratory judgment that the "preemption" provisions of ERISA do not permit the Trustees to refuse to remit monies sequestered by the Board pursuant to a Notice to Withhold.

Had the action been initiated by the CLVT, instead of the Board, no jurisdictional question would exist.

Under the provisions of Section 502(a)(3) of ERISA, the Trustees, as fiduciaries, may bring an action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . ." *See* 29 U.S.C. Section 1132(a)(3). The U.S. District Courts are given "exclusive jurisdiction" of such actions; *see* 29 U.S.C. Section 1132(e)(1). These statutory provisions have been recognized by courts as estab-

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ficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1).

Section 404(a)(1) of ERISA provides, in pertinent part, that

". . . A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1104(a)(1).

lishing "a federal policy favoring federal adjudication of the content of fiduciary duties under ERISA." See *Wong v. Bacon*, 445 F. Supp. 1177, 1188 (N.D. Cal. 1977).[7]

The Board would have this Court find that no federal jurisdiction exists in this case, simply because the Board beat the Trustees through the courthouse door. Such a position would seriously undermine the apparent desire of Congress to have sensitive issues of fiduciary responsibility determined by the federal judiciary.[8] Neither the District Court nor the Ninth Circuit Court of Appeals were persuaded by the Board's argument.

Moreover, it is well established that federal courts have power to re-align the parties and pleadings in an action to achieve the ends of justice. *See* FRCP 8(c) and (f); *Wong v. Bacon, supra.*

In the present case, no answer or counterclaim was filed by the Trust and the Trustees, since the U.S. District Court elected to treat the defendants' Motion to Dismiss as if cross-motions for summary judgment had been filed by the parties. Nevertheless, it is clear that the contents of the

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[7]The same court noted that "It would be ironic for a federal court to defer to a state court for a determination of federal law that Congress wanted the federal courts to decide." *Id.*

[8]Had the CLVT and its Trustees filed an action seeking to enjoin agents of the Board from attempting to garnish assets of the CLVT, the situation would be comparable to that in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982) and *Rath Packing Co. v. Becker*, 535 F.2d 1295 (9th Cir. 1975) *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977). In the *Stone & Webster* and *Rath Packing* cases, employers sought injunctive relief against state efforts to regulate their businesses, on the ground that federal law had preempted the subject matter of the regulation. *See also Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978). Certainly the "federal question" is as present in this action as it was in *Stone & Webster* and *Rath Packing*. It would be an exercise in empty formalism to hold that federal question jurisdiction does not exist in this case, merely because the CLVT is the defendant, rather than the plaintiff.

Petition for Removal and Motion to Dismiss filed by the CLVT and the Trustees contain all the elements of the legal claim these parties have against the Board. The courts below could properly have considered these pleadings to constitute a counterclaim by the CLVT and the Trustees against the Board, for which jurisdiction would clearly lie under Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3). *Cf. Wong v. Bacon*, 445 F. Supp. 1177, 1184 (N.D. Cal. 1977) [treating the answer of trustees of a pension trust as a counterclaim, and, viewing the answer as such, finding that an independent jurisdictional basis existed for the counterclaim].

It is well settled that where an independent jurisdictional basis exists for entertaining a counterclaim, the District Court may entertain it, despite an absence of jurisdiction over the principal claim. See *International Video Corp. v. Ampex Corp.*, 484 F.2d 634, 636-637 (9th Cir. 1973); *National Research Bureau, Inc. v. Bartholomew*, 482 F.2d 386, 388-389 (3d Cir. 1973).

Viewing the Petition for Removal and Motion to Dismiss filed by the CLVT and the Trustees as a "counterclaim," it is clear that federal jurisdiction would lie.

Viewing the Petition for Removal and Motion to Dismiss as constituting a "counterclaim" will further the ends of justice in this case. No prejudice will accrue to the Board, since the Board was well aware of the legal claim of the CLVT and the Trustees even before this lawsuit was filed. (*See* Complt., Exh. "H", Jt. App. 66-67).[9] Furthermore,

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[9]Indeed, it is clear that the Appellees actually *invited* the Board to file suit to resolve the important question of federal law raised by this case. On January 7, 1980, following receipt of the Department of Labor's Advisory Opinion, Lionel Richman, co-counsel to the CLVT, wrote to the Board to advise them of the opinion. The letter notes that the CLVT would not be taking steps to disburse the funds sought by the Board for approximately a month "in the event you desire to institute legal action to test this opinion." (Complt., Exh. "H", Jt. App. 66-67.)

no useful purpose would be served by requiring the preparation of an additional pleading, labeled "counterclaim," when the parties' dispute is purely a legal one, which is adequately addressed in the pleadings already filed. Though it may be conceded that, as a matter of procedural nicety, it would have been desirable for the District Court to have postponed the hearing on defendants' Motion to Dismiss until the pleadings were fully developed,[10] the substantive result would not have been affected.

2. The Case Arises Under Federal Law.

Any civil action of which the federal district courts would have original jurisdiction "founded on a claim or right arising under the Constitution, treaties or laws of the United States" is properly removable to a U.S. District Court, if filed in a state court. *See* 28 U.S.C. Section 1441(b).

The question of what types of cases "arise under" the laws of the United States is a troublesome one, which has generated much litigation.[11] As the Board notes in its Brief,

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[10]If the CLVT and Trustees had initiated their own suit in federal court, or if the District Court had delayed ruling on the legal question in this case until after the CLVT and Trustees had filed an answer and counterclaim, the situation would be parallel to that in *First Federal Savings & Loan Assn. of Boston v. Greenwald*, 591 F.2d 417, 423 (1st Cir. 1979). In *Greenwald*, a state bank commissioner brought suit in state court to enforce certain provisions of Massachusetts law allegedly applicable to federal savings and loan associations operating in the State of Massachusetts; the defendants removed the case to federal court, where they had filed a federal court action seeking declaratory judgment on the question of whether federal law preempted the right of the state to enforce its laws and regulations. On appeal, the First Circuit avoided deciding whether jurisdiction existed in U.S. District Court to hear the *state's* action, since jurisdiction over the claim of the savings and loan associations, which had been consolidated with that of the state, was clear.

[11]As one commentator has noted: "One of the most perplexing exercises in American law practice is the effort to define with certainty the original jurisdiction of the lower federal courts in matters where there is no diversity of citizenship." London, " *'Federal Question' Jurisdiction — A Snare and Delusion*," 57 Mich.L.Rev. 835 (1959).

it has generally been held that the jurisdictional basis for the claim must be established by reference solely to the complaint.[12] See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876 (1950); *Gully v. First National Bank*, 299 U.S. 109, 113, 57 S.Ct. 96, 98 (1936); *Wong v. Bacon*, 445 F. Supp. 1177, 1182 (N.D. Cal. 1977).

In the present case, the Complaint makes detailed and explicit reference to the provisions of ERISA on which the present dispute turns. The Board alleges, in its Complaint, that it has issued Notices to Withhold, pursuant to California Revenue & Taxation Code Section 18817, to the CLVT, and that the CLVT has notified the Board that it "would not disburse the funds levied upon to either [the Trust beneficiaries involved] or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974." (*See* Complaint, Paras. 9, 11 and 14; Jt. App., pp. 5-7.)

The Complaint further alleges that on January 7, 1980, the CLVT notified the Board that "the defendants would not honor levies made upon them by the State of California pursuant to an advisory opinion from the United States Department of Labor." (Complt., Para. 15; Jt. App., pp. 6-7.) The U.S. Department of Labor's advisory opinion is attached as Exhibit "H" to the Complaint. The opinion

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[12]Some commentators have criticized the rule that the face of the complaint must be the sole source of the "federal question," suggesting, instead, that the trial court retain each case until the pleadings become fully developed, to determine whether a genuine federal question exists; *see* Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U.Pa.L.Rev. 639, 665 (1942); Troutman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 Vand.L.Rev. 445, 460 (1954).

letter extensively discusses the application of the preemptive provisions of ERISA to the facts of this case. It states:

> "[I]t is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA § 514."

Thus, there can be no serious question that the Complaint and the exhibits incorporated therein, fully raise the federal question at issue in this case.[13]

The Board appears to contend that federal question jurisdiction does not exist because the *remedy* invoked by the Board is conferred by state law. However, it is now well settled that the controlling question is not whether the *remedy* is federally provided, but whether the determinative issues in the case necessarily require interpretation of federal law.[14] This Court has not endorsed the proposition that the

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[13]Several lower courts have suggested that where issues of federal preemption are present, the federal question need not even appear on the face of the complaint: "An exception to the requirement that the federal question appear on the face of the complaint is found where the state law giving rise to the action has been preempted by federal law." *Gardner v. Clark Oil & Refining Corp.*, 383 F. Supp. 151, 152 (E.D. Wis. 1974) [dicta]; citing *Fischer v. Holiday Inn of Rheinlander, Inc.*, 375 F. Supp. 1351 (W.D. Wis. 1973); *Fay v. American Cystoscope Makers*, 98 F. Supp. 278 (S.D.N.Y. 1951).

[14]Professor (and U.S. District Judge) Weinstein has stated: "What is usually meant . . . is that for a case to be one which 'arises under federal law,' the federal substantive element must be at least sufficiently central to the dispute so that it will have some impact on its outcome." *Sylgab Steel & Wire Corp. v. Strickland Transportation Co., Inc.*, 270 F. Supp. 264, 268 (E.D.N.Y. 1967).

Another commentator has suggested "[T]hat a suit arises under federal law whenever the plaintiff's complaint discloses actual, substantial reliance — at the time the judicial power is invoked — on a proposition of law that touches on federal primary relationships." Note: "*The Outer Limits of 'Arising Under'* " 54 NYU L.Rev. 978, 979 (1979).

Other commentators have suggested that it is relevant to consider the importance of the federal legal issue raised, and the extent to which federal expertise may assist in the resolution of the issue. *See, e.g.*, Cohen, "*The Broken Compass: The Requirement That a Case Arise 'Directly' Under Federal Law*," 115 U.Pa.L.Rev. 890, 906 (1967).

"cause of action" must be one arising under federal law. *See, e.g., Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202, 41 S.Ct. 243 (1921).

In *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 99 (1936), relied upon by the Board, it was held that federal question jurisdiction would exist when the right asserted was such that "it will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." This is clearly a case in which the right of the Board to levy tax assessments on the CLVT "will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." That, in fact, is the whole point of this lawsuit.

Moreover, the *Gully* case involved the oblique application of federal law in an area in which federal regulation is less than pervasive. By contrast, the present action, like that before the Court in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772 (1974) involves the application of federal law in an area Congress consciously sought to fully occupy; *see* 29 U.S.C. Section 1144(a), and legislative history discussed, *infra*.

The circuit courts of appeal have also expressed the view that the remedy sought is not determinative. In *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), the Second Circuit Court of Appeals stated that "even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such law." 339

F.3d at 827.[15] *See also North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229 (2d Cir. 1978).

In *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (10th Cir. 1972) an action was initiated in state court in Utah by a local bank, which sought to enjoin a competing bank from constructing a drive-in banking facility across the street from its main quarters. No federal remedy was sought. The defendant bank removed the case to federal court, asserting that the case necessarily raised questions of federal banking law. On appeal, the Tenth Circuit Court of Appeals affirmed, finding that the removal was proper, because several banking terms defined by federal law would have to be construed in order to determine the outcome of the case.

The Board seeks to avoid the application of these principles by arguing that the application of ERISA to the facts of this case is purely a matter of defense, which is not a

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[15]Other courts have adopted the so-called "pivotal question" formulation. The Second Circuit has stated that the test of whether a complaint presents a federal question is: "whether the complaint is for a remedy expressly granted by an act of Congress or otherwise 'inferred' from federal law, or whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed . . ." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 489 (2d Cir. 1968) quoting *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965),*cert. denied*, 382 U.S. 1026, 86 S.Ct. 643 (1966).

Essentially the same test was adopted by the Third Circuit in *Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3d Cir. 1972); *see also Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978); *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); *Sweeney v. Abramovitz*, 449 F. Supp. 213 (D. Conn. 1978). *See generally*, Note, "The Outer Limits of 'Arising Under,' " 54 NYU L.Rev. 978 (1979).

proper ground for the invocation of federal jurisdiction.[16] Even where the federal question is primarily a matter of defense, however, the courts have held jurisdiction to be proper, if the defendant could have brought its own action in federal court:

> "It is plain that the federal law that gives rise to a federal question must be an element of the plaintiff's complaint. The well-pleaded complaint rule precludes taking jurisdiction on the basis of an anticipated federal defense. However, a suit for a declaratory judgment that defendant does not have a right under federal law, in circumstances in which a coercive action by the defendant based on his supposed federal law right would be cognizable in federal court, is now held to be within federal question jurisdiction." 13 Wright & Miller, *Federal Practice & Procedure*, Section 3562 (West 1975).
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> *See also*, Note: "Federal Jurisdiction over Declaratory Suits Challenging State Action," 79 Col.L.Rev. 982, 983 (1979).

In this action, it is quite clear that the CLVT and its Trustees could have brought a suit in federal court, to obtain declaratory relief regarding the right of the CLVT to be

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[16]Appellees are aware that there is an apparent split among the members of this Court with regard to the question of whether a defense based upon federal preemption of state law, where it is "pivotal" to the outcome of the case, is a claim "arising under" federal law for the purposes of 28 U.S.C. Section 1141(b). See *Kerr-McGee Chemical Corporation v. Illinois*, ___ U.S. ___, 103 S.Ct. 469 (1982) (BLACKMUN, J., concurring in the denial of certiorari; WHITE, J., joined by MARSHALL, J., dissenting from the denial of certiorari). For the reasons expressed in Part A.1. of the Argument herein, however, Appellees believe it is unnecessary for the Court to reach this issue. If the pleadings filed by the CLVT and the Trustees are viewed, for substantive purposes, as constituting a "counterclaim," then it is clear that *exclusive* federal jurisdiction to hear such a claim resides in the U.S. District Courts. *See*, discussion, *supra*, Argument, Part A.1.

immune from garnishment orders issued by state agencies.[17] The suit is in its present posture solely because the Board elected to bring suit first. Regardless of the party initiating the declaratory relief action, the "pivotal question" for decision is the same: Whether ERISA preempts the right of the State of California to levy upon trust assets. *Cf. Shareholders Management Co. v. Fred F. Gregory*, 449 F.2d 326 (9th Cir. 1971).

As the Ninth Circuit majority noted, the defendant Trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. Section 1002(14)(A). As such, they are precluded from disbursing CLVT funds in any manner other than prescribed in 29 U.S.C. Sections 1103(c)(1) and 1104(a)(1). As a practical matter, no court could determine the obligations of the defendant Trustees without focusing on the explicit provisions of ERISA controlling the disbursal of Trust monies.

The decision of the Ninth Circuit in *Guinasso v. Pacific First Federal Savings & Loan Assn.*, 656 F.2d 1364 (9th Cir. 1981) relied upon by the Board and the dissent below, contains dicta which strongly suggests that the assertion of

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[17]Federal courts have occasionally realigned the claims of the parties in order to eliminate any question regarding the propriety of federal jurisdiction. In *Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cal. 1977), a U.S. District Court found that the plaintiffs' original complaint, seeking restitution of improper trust fund payments under California law, did not adequately raise a federal issue. However, the answer of the defendant trustees raised important federal questions under ERISA. Rather than dismiss the action, the U.S. District Court elected to view the defendants' answer as a "counterclaim for a declaratory judgment against plaintiffs." Having characterized the pleadings in this fashion, the Court found that the Court-created "counterclaim" adequately raised a federal question and that jurisdiction was proper. No such judicial legerdemain was performed in this action. The Board's Complaint clearly raises the federal issue. However, the *Wong* case is noteworthy because it demonstrates that federal courts recognize the important federal legal issues at stake in cases raising claims of preemption by ERISA.

jurisdiction in this case was proper. The *Guinasso* opinion states: "A suit arises under federal law within 28 U.S.C. Section 1331 if the complaint, properly pleaded, *presents a substantial dispute over the effect of federal law, and the result turns on the federal question.*" 656 F.2d at 1366, citing *Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 667 (9th Cir. 1980); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 249 (9th Cir. 1974). [Emphasis supplied.]

The *Guinasso* opinion goes on to note that "a suit arises under an act of Congress regulating commerce within 28 U.S.C. Section 1337 if it seeks relief granted or implied by the act or '*hinges on' the act's interpretation.*"[18] [Emphasis supplied.] *Guinasso, supra*, 656 F.2d at 1366, citing *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569 (1975).

All suits relating to the terms of an employee benefit plan or the actions of plan fiduciaries "arise" under federal substantive law, whether brought in state or federal court, just as suits involving a breach of a collective bargaining agreement arise under federal law. Section 502(e) of ERISA vests the federal courts with exclusive jurisdiction over all actions authorized under ERISA, except that state courts are given

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[18]It is also noteworthy that *Guinasso* is apparently inconsistent with the decision of the Ninth Circuit in *Meyers v. Beverly Hills Federal Savings & Loan Assn.*, 499 F.2d 1145 (9th Cir. 1974). In *Meyers*, the plaintiffs sought to invalidate prepayment penalties imposed by federal savings and loan associations, on the ground that they violated California law. The suit was brought in state court, and the defendant savings and loan associations removed the case to federal court. In the federal court proceeding, the defendants successfully asserted a defense of federal preemption to plaintiffs' claims. The *Guinasso* court distinguished *Meyers* by noting that the jurisdictional question was not extensively considered therein. *See also Rath Packing Co. v. Becker*, 535 F.2d 1295 (9th Cir. 1975), *aff'd on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977).

concurrent jurisdiction over benefit claim cases which do not involve application of Title I of ERISA.

Just as the courts are charged under LMRA § 301, 29 U.S.C. § 185, to develop a federal common law of the collective bargaining agreement, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957), to be applied in suits on such agreements in state as well as federal court, *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571 (1962),[19] so too has Congress directed and authorized the courts to develop a federal common law of employee benefits to effectuate and supplement the provisions of ERISA. *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3rd Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 999 (1982); *Woolfork v. Marine Cooks & Stewards Union*,

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[19]The Court should not overlook the strong possibility that § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides an independent basis for the assertion of federal jurisdiction over this action. It is now settled that a trust agreement, such as that creating the CLVT, is an employer-union contract of the type covered by § 301. See *Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976); *Carpenters Local 626 v. Delaware Contractors Assn.*, 344 F. Supp. 1281 (D. Del. 1972), *aff'd. per curiam*, 477 F.2d 564 (3rd Cir. 1973) [action to determine lawfulness of administration of vacation fund;] *cf. Smith v. Evening News Association*, 371 U.S. 195, 200-01, 83 S.Ct. 267 (1962). In the present action, the Board seeks to compel the Trustees of the CLVT to do something which the Trust Agreement of the CLVT clearly forbids: disbursing funds to third parties in a manner not permitted by the CLVT Trust Agreement. The question of whether the Trustees will violate the CLVT Trust Agreement, and thus their fiduciary duties, by paying these monies to the Board is thus squarely in issue in the case. The declaratory relief requested by the Board in this case would necessarily obligate the District Court to interpret the provisions of the Trust Agreement and determine whether the Trust Agreement, together with the obligations imposed upon the Trustees by federal law, prevented the Trustees from delivering funds to the Board. Federal jurisdiction of such a claim lies under the provisions of § 301(a) of the LMRA. Moreover, the fact that § 301 is not specifically mentioned in the complaint is not controlling; see *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-40 (6th Cir. 1967) ["The force of federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint."] *aff'd*, 390 U.S. 557, 88 S.Ct. 1235 (1968).

642 F.2d 966 (5th Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1334, 1351 (8th Cir. 1980); *Laborers Fringe Benefit Funds v. Northeast Concrete and Construction Co.*, 640 F.2d 1350 (6th Cir. 1981). *See Dependahl v. Falstaff Brewing Corporation*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512 (1982). This formulation of a federal substantive law of welfare and pension plans was viewed as a corollary to the virtually total federal preemption of the field. As noted by Senator Jacob Javits:

> "In view of Federal preemption, state laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans — unless a criminal statute of general application — establishing state termination insurance programs, et cetera, will be superceded. *It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.*" 120 Cong. Rec. 29, 942 (1974), III Legislative History of ERISA 4771, as quoted in *Murphy v. Heppenstall, supra* at 237.

This clear intent to federalize the law relating to employee benefit plans[20] compels the conclusion that any state court action which would require the interpretation or application

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[20]The Board's state court action *itself* was preempted by ERISA. State judicial and administrative proceedings which encroach upon the matters governed by ERISA may be enjoined. See, *e.g.*, *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980) (federal court may enjoin state court proceedings which make it impossible for a plan fiduciary to carry out his duties); *Armco, Inc. v. Ludwick*, 3 EBC 1574 (D. Kan. 1982) (federal court enjoins state administrative hearing affecting plan); *Azzaro v. Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977) (state insurance commissioner may not conduct investigation of benefit plan governed by ERISA).

of ERISA to a plan document "arises under" the laws of or the United States and is subject to removal under § 1441. *Cf. Boys Market v. Retail Clerks Union*, 398 U.S. 235, 245, 90 S.Ct. 1583, 1589, n.11 (all suits under § 301 of the Labor Management Relations Act may be removed to federal court pursuant to 28 U.S.C. § 1441).

B. The Court of Appeals Correctly Held That the State's Right to Garnish Trust Assets Is Preempted by ERISA.

1. Section 514's Preemption of State Law Is Plainly Worded and Is Virtually Total.

The exceptional breadth of federal preemption intended by Congress in enacting ERISA is manifest in the language of Section 514, quoted *supra*. Section 514(b) expressly enumerates the *only* categories of state laws saved from the otherwise total preemption of Section 514(a). These enumerated exceptions in no way protect the California laws in question. Indeed, subsection (4) of Section 514(b) further evidences the pervasiveness of the provision's basic preemption by providing:

> Subsection (a) of this section shall not apply to any generally applicable *criminal* law of a State.

29 U.S.C. Section 1144(b)(4). (Emphasis added.) There is no such general provision relating to revenue laws or other civil laws.

The legislative intent underlying ERISA preemption is clear. Rejecting narrower formulations of preemption, Congress adopted Section 514 with the express intent of

foreclosing "endless litigation" over the "perimeters of preemption."[21]

Congress was cognizant of the potential consequences inherent in its foreclosing litigation over the scope of Section 514. It is recognized that its abrogation of the judiciary's power to define preemption on a case-by-case basis could result in unanticipated distortions. Accordingly, Congress provided a safety valve, a forum for consideration of such cases. That forum was not the courts, however; *it was Congress itself*. In Section 3022 of ERISA, Congress instructed the Joint Pension Task Force to monitor the effects and continuing desirability of its broad federal preemption of state laws relating to plans and to report the findings back to Congress for review and possible action. ERISA Section 3022(a)(4); (29 U.S.C. Section 1222(a)(4)).

In enacting ERISA, Congress burdened employee benefit plans with complicated and costly administrative and structural requirements regarding disclosure, fiduciary responsibility and other matters, for the purpose of protecting plan participants. At the same time Congress acknowledged that

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[21]A number of commentators have urged that the preemption provisions of ERISA be read broadly. *See, e.g.*, Hutchinson and Ifshin, "*Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*," 46 U.Chi.L.Rev. 23 (1978):

> "We conclude that Congress intended to preempt almost all state regulation of employee pension and welfare benefit plans, but that courts have often defined the scope of preemption more narrowly where preemption may create what appear to be undesirable regulatory lacunae or supersede state law in fields traditionally left to state government. We argue that this continued whittling away of the preemptive reach of ERISA seriously threatens the regulatory scheme devised by Congress, and that it is up to Congress, not the courts, to narrow ERISA's preemption of state law where particular policy reasons make such action appropriate." *Id.* at 23-24.

See generally, Turza and Halloway, "*Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*," 28 Catholic U.L.Rev. 163, 166-169 (1979) (discussing conflicting analyses).

employee benefit plans were voluntary and that ERISA had to be tailored *wherever possible* to reduce the burdens upon the plans. Congress expressly noted that disregard of this latter reality could produce an anomalous result. The statute designed to protect plan participants could prompt termination of the very plans in which they participate — in legislating the laying of golden eggs, Congress could kill the goose. *See* S. Rep. No. 383, 93rd Cong., 2d Sess. 18-19 (1973).

The Congressional mandate to the judiciary is thus clear in language, in legislative history, and in motive. Until further notice from Congress, ERISA's preemption of state law is inviolate. To the extent California's laws relate to employee benefit plans, they are preempted.

2. Congress Intended Section 514's Total Preemption to Be Given Full Effect by the Judiciary.

The legislative history of ERISA establishes that Congress intended the exceptional preemptive sweep created by the "plain words" of Section 514 to be given full effect. During the legislative hearings which preceded the enactment of ERISA, both houses of Congress were considering versions of a bill to requlate employee benefit plans. H.R. 2 (93rd Cong., 1st Session (1973)), from which the language of ERISA is largely derived, originally contained a preemption provision which was limited in scope. However, during the course of Joint House-Senate Conference Committee hearings to draft the final version of ERISA, a much more sweeping preemption provision was substituted. The Conference Report explains:

> "Under the substitute, the provisions of Title I are to supersede all state laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee

> organization that represents employees engaged in or affecting interstate commerce."

S. Rep. 1090 [H. Rep 1280], 93rd Cong., 2d Sess. 383 (1974) *reprinted in* "Legislative History of the Employee Retirement Income Security Act of 1974," Committee Print, 94th Cong., 2d Sess. 4650 (1976) (hereinafter "*Legislative History*").[22]

The remarks of Senator Jacob Javits, bill co-sponsor and senior minority member of the Senate Committee on Labor and Public Welfare, further amplify and delineate the Congressional preemptive scheme in ERISA. Senator Javits stated:

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[22]Senator Harrison Williams, Jr., bill co-sponsor and Chairman of the Senate Committee on Labor and Public Welfare, issued the following explanatory statement regarding the preemptive provisions of ERISA:

> "It should be stressed that, with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for federal regulation, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply *in its broadest sense* to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law." [Emphasis supplied.]

120 Cong. Rec. 2933 (1974); *Legislative History* at 4745-46.

Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, sounded the same note:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to federal authority of the sole power to regulate the field for employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation . . . The conferees, *with the narrow exceptions specifically enumerated, applied this principle in its broadest sense* to foreclose any non-federal regulation of employee benefit plans. Thus, the provisions of Sec. 514 would reach any rule, regulation, practice or decision of any state, subdivision thereof, or any agency or instrumentality thereof — including any professional society or association operating under color of law — which would *affect* any employee benefit plan as described under Sec. 4(a) and not exempt under Sec. 4(b)." [Emphasis supplied.]

120 Cong. Rec. 29197 (August 20, 1974); *Legislative History* at 4670.

"Both House and Senate bills provided for preemption of state law, but — with one major exception appearing in the House bill — defined the perimeters of preemption in relation to the areas *regulated* by the bill. Such a formulation raised the possibility of endless litigation over the validity of state action that might impinge upon federal regulation, as well as opening the door to multiple and potentially conflicting state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected with the federal regulatory scheme.

"Although the desirability of further regulation — at either the state or federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive federal interest and interest of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of state action in the field of private employee benefit programs.

"The conferees — recognizing the dimensions of such a policy — also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made."

120 Cong. Rec. 29942 (August 12, 1974); *Legislative History* at 4770-71.

The Board argues that ERISA does not preempt the right of the State to levy on CLVT assets because no portion of ERISA *explicitly* forbids such levies. This assertion ignores the pregnant fact that the framers of ERISA deliberately bypassed piecemeal preemption in favor of a statute which

would comprehensively preempt state interference with covered employee benefit plans. *See* discussion, *supra*. If the Board's position were accepted, only state laws explicitly mentioned in ERISA would be preempted. Such an absurd interpretation would ignore the comprehensive preemptive effect of Section 514(a).

Moreover, this Court has made it clear that preemption of state law need not be founded upon an explicit federal statute. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or impiicitly contained in its structure and purpose.' " *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3022 (1982), quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977).

In its brief, the Board stresses the strong interest of the State of California in securing an effective means for collection of tax revenues. The existence of such a strong state interest, however, will not ameliorate the preemptive effect of federal law: "These principles [preemption under the Supremacy Clause] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3022 (1982) quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092 (1962).

3. Recent Amendments to ERISA Affirm Congressional Intent to Broadly Preempt State Interference With the Operation of Federally Regulated Employee Benefit Plans.

On January 14, 1983, President Reagan signed P.L. 97-473 into law. The law adds a new paragraph to Section 514(b) of ERISA, 29 U.S.C. Section 1144(b). This pro-

vision exempts the Hawaii Prepaid Health Care Act from the broad preemptive scope of Section 514(a). However, the law also adds paragraph 514(b)(5)(B) to the preemption statute. This portion of the statute provides that:

> "Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —
>
> (i) *Any State tax law relating to employee benefit plans* . . ." [Emphasis supplied.]

At the time this law was passed, the decision of the Ninth Circuit in this case had been "on the books" for a period of six months. Moreover, this Court had agreed to hear this appeal on December 13, 1982. If Congress had intended to send a signal to this Court, or the lower courts, that it disapproved of the broad reading given by the Ninth Circuit in this case to the general preemption clause of Section 514(a), it surely would have done so, since this statute concerns the very preemption provisions involved in this suit. Instead, Congress inserted *additional* language in the statute which seems designed to "keep the lid on" efforts to evade ERISA's broad preemptive reach.[23]

4. The California Garnishment Laws at Issue Directly Encroach Upon the Provisions of ERISA Regulating the Disbursal of Trust Monies.

Sections 403(c)(1) and 404(a)(1) of ERISA, quoted *supra*, restrict the disbursal of trust funds. Section 403(c)(1) is a portion of the statute requiring employee benefit plan assets to be held in trust; Section 404(a)(1) is a portion of the statute describing a fiduciary's obligations regarding the disposition of trust fund assets.

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[23]For a more extended discussion of the legislative history of the 1983 amendment to Section 514 of ERISA, *see* the amicus curiae brief filed by the AFL-CIO in this proceeding.

The obvious purpose of these provisions is to keep assets of an employee benefit plan from being disbursed to third parties except in limited and carefully controlled circumstances, thereby eliminating the possibility that such assets will be diverted from their intended use. Although ERISA permits benefits plan assets to be paid to persons other than trust beneficiaries in certain clearly defined instances, it contains no authorization permitting the Trustees to respond to levies and garnishments issued by local or state agencies.[24]

If these issues of policy are open (and we believe they are not) sound reasons exist for the application of the preemption doctrine in cases such as the present one.[25] Consider the following points.

1. The whole purpose of a "spendthrift" trust such as the CLVT is to create a pool of savings for each individual, to which he will only have access at a specified time. Thus,

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[24]The Board argues that nothing in ERISA explicitly forbids a state from applying sequestration remedies against an ERISA-regulated trust fund. This argument misses the point. As this Court held in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981), the states are not permitted to apply laws to such trusts in a manner which would narrow their federally sanctioned operations. The CLVT Trust Agreement provides that the CLVT's assets shall not be disbursed except to beneficiaries in a specifically prescribed fashion. This is consistent with the command of ERISA that the assets of such a trust "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying resonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1). By attempting to apply a state law which would, in effect, mandate an exception to the provisions of the Trust Agreement and the command of ERISA, the state has encroached upon the operation of the CLVT in precisely the way this Court found to be forbidden in *Alessi*.

[25]The Board also argues that the CLVT is not entitled to claim the protection of the preemptive provisions of ERISA, because ERISA regulates pension plans more comprehensively than other types of employee benefit trusts. This argument overlooks the fact that each of the statutory provisions upon which the CLVT relies fall within the provisions of ERISA relating to *all* employee benefit plans. See ERISA, Section 514, 29 U.S.C. Section 1144; ERISA, Section 403(c)(1), 29 U.S.C. Section 1103(c)(1).

the Trust Agreement specifically precludes the hypothecation of trust fund assets (see Statement of Facts, *supra*). If creditors of beneficiaries of the CLVT, including the Board, can reach Trust assets through garnishment, the entire purpose of the Trust will be frustrated. "Spendthrift" trusts like the CLVT are well known at common law and have been recognized as permissible under the provisions of Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. 186(c)(6). Their "spendthrift" terms are enforceable absent any clear design to defraud third parties. *See, e.g., United Mine Workers of America v. Boyle*, 418 F. Supp. 406, 408-410 (D.C.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied sub nom. Antal v. Boyle*, 435 U.S. 956, 98 S.Ct. 1589 (1978).

2. If such creditors know that they can reach Trust assets to satisfy their claims, the beneficiaries of the Trust will be able to do indirectly what they cannot do directly, *i.e.*, use Trust assets to satisfy debts and divert portions of their regular (non-Trust) income to other purposes. Beneficiaries who wish to obtain credit may over-extend themselves financially by telling finance companies, car dealers, and other sources of credit that their Trust benefits are a "backup" to their regular income.

3. The administrative expense of having to respond to garnishment notices and claims of judgment creditors on a continuous basis will significantly enlarge the cost of operating the Trust. This will shrink the amount of assets available for the beneficiaries.

4. Only workmen who are actually employed under the terms of a collective bargaining agreement have contributions made to the Trust for their benefit. These workmen are receiving wages, which are subject to garnishment in any event. There is no practical reason why the state cannot proceed, as it usually does, to attempt to garnish wages,

rather than attempt to reach assets of the Trust to which the employee is not yet entitled.

5. When the employee *does* receive his payment from the Trust (which occurs on an annual basis), the state can use the remedies at its disposal to levy on the funds in the employee's hands. This relieves the Trust of the administrative burden of responding to large numbers of Notices to Withhold and other types of garnishments and levies, and places the burden of dealing with such matters where it belongs, *i.e.*, on the employee, his employer, and his creditors.

A further reason for finding the application of state sequestration laws preempted appears in this Court's opinion in *Alessi v. Raybestos-Manhattan, Inc., supra.* Vacation trusts, like the pension plans considered in *Alessi*, are creatures of collective bargaining, which have long enjoyed sanction under federal law. *See* LMRA Section 302(c)(6), 29 U.S.C. Section 186(c)(6). Such trusts, which "emerge from collective bargaining" call forth "the traditional federal interest in precluding state interference with labor-management negotiations . . ." and "as a subject of collective bargaining, [their] terms themselves become expressions of federal law, requiring preemption of intrusive state law." *Alessi, supra*, 101 S.Ct. at 1907.

This court has repeatedly expressed its concern that state laws not be permitted to interfere in areas of paramount federal concern, even if they do not directly conflict with federal statutory provisions; *see, e.g., Teamsters v. Oliver*, 358 U.S. 283, 296, 79 S.Ct. 297, 304 (1959); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 326, 79 S.Ct. 773 (1959). After the passage of ERISA, there can

be no serious question that the regulation of employee benefit plans is such an area of paramount federal concern.

The Board relies heavily upon the decision in *National Bank of North America v. International Brotherhood, etc.*, 419 N.Y.S.2d 127, 69 A.D.2d 679 (1979), *appeal dismissed*, 48 N.Y.2d 752, 422 N.Y.S.2d 666 (1979), where an intermediate state court, one judge dissenting, permitted the garnishment of the proceeds of a pension trust regulated by ERISA.

The *National Bank of North America* case is clearly distinguishable from the present proceeding. In the first place, its holding that ERISA-regulated *pension funds* may be garnished under state law is clearly a minority view; see *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980). Moreover, since the case concerns a pension fund, its entire focus is upon the special ERISA provision relating to the non-alienation of pension benefits, 29 U.S.C. § 1056(d) which is not involved in this proceeding. Furthermore, the *National Bank of North America* opinion was written prior to the issuance of the Advisory Opinion by the Department of Labor which underpins the CLVT's position in this case; the *National Bank of North America* opinion contains no discussion of the legal effect of § 403(c) and § 404(a)(1) of ERISA, or of the general preemption provisions, of § 514, which underlie the Department of Labor's opinion relating to the present case.

The Board also places strong reliance on *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied* 453 U.S. 922 (1981) and its progeny, which have allowed state courts to order the division of benefits payable by pension plans governed by ERISA. With all respect, we believe this reliance is misplaced. The *Stone* decision, and many of the decisions which have followed it, have specifically emphasized that the re-

lationship between spouses and other members of the family unit is peculiarly a source of state concern and that "this factor distinguishes community property claims of nonemployee spouses from the claims of business creditors, who are not members of the family unit protected by ERISA." 450 F. Supp. at 926. Thus, the *Stone* court concludes that inter-spousal "community property interests [are to be treated] differently from other claims against benefits."

The pervasive interest of states in regulating family relations is not present in this case. All that is at stake here is an effort by a creditor (albeit a governmental entity) to satisfy a claim for delinquent taxes. Opening the door to such claims will necessarily expose ERISA-regulated trust funds to claims from general creditors who are not objects of special state concern.

Moreover, the fact that the *Stone* case involved principles of community property law, traditionally a matter of intimate state concern, was specifically noted by the court:

> "Regulation of benefit plans is an exercise of the police powers of states, but state regulation of benefit plans is not nearly as well established as state regulation of community property. To preclude state regulation of this latter area would involve a much more radical disturbance of 'the federal-state balance' 450 F. Supp. at 932, quoting *Jones v. Rath Packing Co.*, 430 U.S. 519 at 525, 97 S.Ct. 1305 at 1308."

Finally, State law itself exempts many types of employee benefits from attachment or garnishment. *See, e.g., Ogle v. Heim*, 69 Cal. 2d . . . (1968); *Miller v. Superior Court*, 69 Cal. 2d 14 (1968). There is nothing "unusual," therefore, about a federal law requiring such an exemption.

5. Deference Should Be Accorded to the Determination of the Department of Labor That ERISA Preempts State Garnishments.

As previously noted, the Department of Labor has issued an Advisory Opinion, holding that the preemption provisions of ERISA preclude the State of California and its instrumentalities from garnishing or levying upon assets held by the CLVT.

With the exception of tax matters and certain other specialized areas which are reserved to other departments, the Secretary of Labor is given general authority to issue regulations, investigate claims and initiate litigation to enforce the provisions of ERISA; *see* 29 U.S.C. Sections 1132(a), 1132(h), 1132(i), 1132(j), 1133, 1134(a), and 1135.

Though the Advisory Opinion of the Department of Labor is admittedly not a "legislative regulation," it is an interpretative determination, entitled to the measure of deference accorded such rulings. *Cf. Buczynski v. General Motors Corporation*, 616 F.2d 1238, 1242 (3rd Cir. 1980), *aff'd. sub nom. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 1903, n.13 (1981). The Ninth Circuit's ruling is consistent with the Advisory Opinion of the Department of Labor, and with the language of ERISA's preemption provisions.

6. Application of Preemption Principles to This Case Is Consistent With Past Applications of the Preemption Doctrine by This Court.

This is not the first case in which this Court has been forced to consider whether paramount federal interests require the imposition of limitations upon state taxing power. For example, last term in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, ___ U.S. ___, 102 S.Ct. 3394 (1982), this Court held that federal law preempted the right of the State of New Mexico to impose a gross

receipts tax upon revenues received by a non-Indian construction company for work performed on an Indian reservation. Similarly, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980), this Court found that the federal government's comprehensive regulation of the harvesting and sale of timber owned by Indian tribes precluded state taxation of receipts of non-Indian logging and hauling companies employed to work on tribe-owned timberlands. This Court rejected the argument that the "general desire [of the state] to raise revenue outweighed the federal interests involved." See also *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242 (1965).

This Court has recognized that in areas of pervasive federal control, a state law necessarily conflicts with the federal scheme if it limits rights which the federal scheme permits. For example, in *Fidelity Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3023 (1982) this Court invalidated the application of California law to preclude the right of federal savings and loan associations to insert "due-on-sale" clauses in mortgage instruments. Such clauses were permitted, but not required, by regulations issued by the Federal Home Loan Bank Board. This Court held that the California rule impermissibly encroached upon the federal regulatory scheme by limiting the options otherwise available under federal law. *Cf. Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477 (1956) [anti-sedition legislation preempted by Congress].

Similarly, in *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704 (1971) this Court invalidated a state statute which provided that financial liability for a damage judgment arising from an automobile accident would survive a discharge in bankruptcy. The Court found that the federal interest in providing "a new opportunity in life and a clear field for

future effort, unhampered by the pressure and discouragement of preexisting debt," embodied in federal bankruptcy laws, outweighed the state interest in "providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent." 402 U.S. at 646, 91 S.Ct. at 1710.

The present case involves an apparent conflict between a state's desire to raise revenue and two areas of paramount federal interest and control: (1) The collective bargaining process and the agreements, including Trust Fund agreements, which are products thereof; and (2) the regulation of employee welfare benefit plans, to insure their continued financial stability.

In weighing the state and federal interests, it is clear that the federal interests must prevail. *Cf. Franklin National Bank v. New York*, 347 U.S. 373, 378, 74 S.Ct. 550, 553 (1954) where this Court found a "clear conflict" to exist between federal laws authorizing national banks to receive savings deposits, but not specifically permitting or requiring them to advertise such services, and a New York law, which forbade them from using the word "savings" in their advertising.

C. There Is No Merit in Appellant's Contention That the Application of ERISA's Preemption Provisions Violates the Tenth Amendment to the U.S. Constitution.

1. The Constitutional Issue Was Not Raised Below and Should Not Be Considered by This Court.

As Appellees have already noted in their opposition to the Jurisdictional Statement, the Board has elected, for the first time, to argue before this Court that the application of §514 of ERISA to preclude the Board from levying upon CLVT assets would impermissibly encroach upon rights

preserved to the states, in contravention of the Tenth Amendment to the U.S. Constitution. We have also noted the consistent line of cases from this Court in which the Court has refused to consider constitutional claims which were not addressed in the court below, and on which no factual record has been made. *See, e.g., Youngberg v. Romeo*, ___ U.S. ___, ___ n.19, 102 S.Ct. 2452, 2457, n.19 (1982); *United States v. Lovasco*, 431 U.S. 783, 788, n.7, 97 S.Ct. 2044, 2048, n.7 (1977).

There are no facts in the present record, and nothing presented to the courts below, which would indicate that the revenue raising powers of the State of California are impaired in any significant way by the limitation on the garnishment rights of the Board compelled by § 514 of ERISA. The State has not presented proof, and has made no serious claim, that any significant loss of revenues has occurred because of its inability to levy on the assets of the CLVT and similarly situated trust funds. Indeed, it should be quite apparent that the State has many alternative resources available to it to satisfy its need for revenue. The statutes on which the Board relies in this case can be successfully employed to levy on bank accounts, escrow accounts, and any other non-ERISA regulated reservoirs of taxpayer's assets available in the State of California. Since, by definition, all of the laborers who are accumulating vacation benefits are necessarily employed, it would be a simple matter for the State to simply garnish their wages. Moreover, the State can immediately seize the payments made to the individual laborers as soon as they are disbursed by the CLVT, without disrupting the CLVT's operations.

If the Board's argument were taken seriously, any "impairment" of the State of California's ability to raise revenue

by any conceivable means, no matter how slight, would be unconstitutional. No decision of this Court supports such an absurd proposition.

2. This Court's Decision in *National League of Cities v. Usery* Does Not Support the Board's Constitutional Claim.

Appellant argues that the Tenth Amendment state sovereignty doctrine discussed in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), prevents Congress from protecting ERISA-based employee vacation savings trusts from garnishment for income taxes owed by trust beneficiaries. In doing so, Appellant asks this Court to extend the *Usery* precedent far beyond the limits implied by the facts of the *Usery* case. This Court has recently indicated that the holding in *Usery* is not a broad condemnation of any legislation which may "touch" areas of state concern. See *E.E.O.C. v. State of Wyoming*, ___ U.S. ___, ___ S.Ct. ___, 51 U.S.L.W. 4219 (March 5, 1983).

The Board's reliance on *Usery* seems particularly puzzling in light of *Hodel v. Va. Surface Min. and Reclam. Assn.* ___ U.S. ___, 101 S.Ct. 2352 (1981). In *Hodel*, the Court set forth three prerequisites to success in an action based upon the holding in *Usery*:

> "It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the '*States* as *States*.' *Id.*, at 854, 96 S.Ct. at 2475. Second, the federal regulation must address matters that are indisputably '*attributes* of state sovereignty.' *Id.*, at 845, 96 S.Ct., at 2471. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas

of traditional functions.' *Id.*, at 852, 96 S.Ct. at 2472." 101 S.Ct., at 2366.

The Board's Tenth Amendment claim satisfies none of these requirements. First, Appellant has not, and cannot, show "that the challenged statute regulates the 'States as States'." *Id.* Unlike *Usery*, this is not a case dealing with federal legislation explicitly regulating the terms of employment between local governments and their employees. 426 U.S. at 836, 96 S.Ct. at 2467. The provisions of ERISA at issue herein do not purport to regulate the states at all. Rather, they regulate the disbursement of monies from employee benefit trusts. See 29 U.S.C. § 1103(c)(1), 29 U.S.C. § 1104(a)(1). Any impact on the states' ability to garnish, attach, or otherwise execute against trust funds is merely incidental to the primary purpose of assuring that trust assets will be used solely for trust purposes.

Applying the second part of the *Hodel* test, it is clear that the regulation at issue herein does not "address matters that are indisputably 'attributes of state sovereignty.' " *Hodel* at 2366 quoting *Usery* at 2471. The states' power to tax may be an attribute of state sovereignty, but the power to collect debts by garnishment is not. The power to garnish is an attribute of creditor status, not an attribute of state sovereignty. *Cf. e.g.*, California Code of Civil Procedure § 708.210, *et seq.* (judgment creditor's garnishment rights) *with* California Revenue and Taxation Code § 18817 (Franchise Tax Board's garnishment rights). In creating tax liability, the state acts as sovereign. In collecting, the state acts as creditor. Federal legislation protecting ERISA-based spendthrift trusts such as the CLVT, from garnishment by their beneficiaries' creditors, addresses matters of creditors' rights, not state sovereignty.

The Board has also failed to make a sufficient showing to satisfy the third requirement set forth in *Hodel*. It has not

shown that preventing states from garnishing ERISA-based vacation trusts like the CLVT "would directly impair their ability 'to structure integral operations in areas of traditional functions.' " The *Usery* opinion emphasizes the fact that, by directly regulating the wages paid public employees, Congress displaced state decision-making authority concerning the internal affairs of local governments. 426 U.S. at 847, 849, 851 and 855, 96 S.Ct. at 2472, 2473, 2474 and 2476.

> "Congress may not exercise that [*i.e.*, the commerce clause] power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made." 426 U.S. at 855, 96 S.Ct. at 2476.

Even if the three tests set forth in *Usery* are met, legislation may still be sustained where "the nature of the federal interest advanced may be such that it justifies state submission." *E.E.O.C. v. State of Wyoming*, ___ U.S. ___, ___ S.Ct. ___, 51 U.S.L.W. 4219 (March 5, 1983), quoting *Hodel, supra*, 452 U.S. at 288, n.29.

In contrast to *Usery*, this case does not involve Congress' displacing local decisions concerning the internal management of local government. Rather, this case involves Congress' prevention of diversion to state coffers of funds held in federally regulated spendthrift trusts not established to benefit the states. No threat of direct impairment of the states' ability to structure integral operations in areas of traditional functions appears in this case.

The *Usery* decision rests on a factual record detailing the "forced relinquishment of important governmental activities" that would have resulted from the challenged legislation. *Id.* at 847, 96 S.Ct. at 2472. Leading constitutional scholars have recognized and applauded the emphasis the

Usery opinion places upon "the state's role of providing for the interests of its citizens in receiving important social services." Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1172 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 Harv. L.Rev. 1065 (1977).

In this case, unlike *Usery*, Appellant has failed to allege or prove a single fact to show that the challenged regulation threatens to diminish the level of essential governmental services the state provides.

Conclusion.

For the reasons stated herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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